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Supreme Court of the United States

October Term, 1951

~~No. 44~~ 3

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee,

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Appellants.

APPELLANTS' BRIEF

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Appellee,

against

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church,

Appellants.

APPELLANTS' BRIEF

Statement of Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York which sustained the validity of Article 5-C of the Religious Corporations Law of that state against the claim that, as construed and applied, it was repugnant to the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of the appeal under Title 28, U. S. C., sec. 1257, and of the non-appealable issues, set forth in the assignment of errors, under sec. 2103 of Title 28 (*Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Co.* v. *Check*, 259 U. S. 530, 547). The judgment was rendered on November 30, 1950. A timely motion for reargument was made on January 12, 1951 and was denied by the state court on March 9, 1951 (298). The appeal was allowed on April 11, 1951 and this Court noted probable jurisdiction on June 4, 1951 (299, 304).

The Opinions Below

The Court of Appeals reversed the judgments of the lower courts in favor of appellants and directed judgment in favor of appellee by a vote of four to three. One majority opinion was written by Judge Conway in which Judges Lewis, Dye and Froessel concurred. A concurring opinion was written by Judge Froessel in which Judges Conway, Lewis and Dye concurred. There was a dissenting opinion by Judge Desmond in which Chief Judge Loughran and Judge Fuld concurred. They are reported in 302 N. Y. 1.

The Appellate Division ruled in favor of appellants by a three to two vote. The majority and minority opinions are reported in 276 App. Div. 309.

The opinion of the Trial Court is reported in 192 Misc. 327.

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711, Vol. 50, McKinney's Consolidated Laws of New York). Its full text is set forth in Appendix A annexed hereto. In substance:

> (a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America". Until April 1924, these religious organizations had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district *hereinabove defined as the Russian Church in America*" (sec. 105).

(c) It provides for the government of *incorporated* Russian Orthodox Churches (sec. 107). It directs that "every" Russian Orthodox church in the State of New York, "whether incorporated before or after the creation of said autonomous metropolitan district * * * shall *recognize and be and remain subject to the jurisdiction and authority of the * * * archbishop or other hierarch or primate*" and other "*governing bodies and authorities of the Russian Church in America*" (sec. 107(1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the * * * rules and statutes * * * of the Russian Church in America" (sec. 107(3)). (Italics added.)

By force of this statute, as construed and applied by the Court of Appeals, appellant Benjamin, who was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by appointment of the Patriarch, the Chief Authority of the Russian Church, and who was occupying St. Nicholas Cathedral of that Church, as such Archbishop, under the canon law of that Church, was ousted from such possession, and occupancy of the Cathedral was awarded to appellee.

Statement of the Case

Nature of the Action

This is a suit in ejectment (1).[1] Appellee, a New York corporation, holds the nominal legal title to St. Nicholas Cathedral in the City of New York. It represents a group of Russian churches, who, in 1924, at a convention in Detroit, purported to secede from the Russian Church at large and organized themselves into an "autonomous metropolitan district" and elected their own archbishop. The statute refers to this group as the "Russian Church in America" (sec. 105). Appellant Benjamin was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by virtue of his appointment to that office by the Patriarch, and he asserted the defense that, as such accredited Archbishop, under the canon law of the Russian Church, he had the exclusive right to occupy the Cathedral (3-4).

Notwithstanding this defense, the Court of Appeals: (1) held that the statute was "conclusive" (302 N. Y. at 21, 33) and that its "mandate" required the ouster from the Cathedral of appellant Benjamin, the appointed archbishop; (2) ruled that, in the absence of the statute, the judgment in favor of appellants should be reversed with a direction that the Trial Court exercise its "discretion" to determine whether the archbishop appointed by the Patriarch or the one elected by the metropolitan district was the "proper trustee" or "proper person" to "administer" the Cathedral (302 N. Y. at 24); and (3) refused, while directing final judgment against him, to rule on the merits of appellant Benjamin's defense of the statute of limitations (302 N. Y. at 21).

The extent to which the statute invades and destroys religious liberty can more readily be determined by examining the nature and structure of the Russian Church and the special and unique status of St. Nicholas Cathedral in that church.

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[1] Unless otherwise indicated numbers in parentheses refer to pages of the printed case on appeal.

The Russian Orthodox Church

The Russian Orthodox Greek Catholic Church, hereafter referred to as the Russian Orthodox Church, is an autocephalous member of that group or family of Greek Catholic or Eastern Orthodox churches which were formally separated by the Great Schism of 1054 from the Western or Latin or Roman Catholic Church. It is an hierarchal church and the supreme authority therein is vested in a Patriarch. He in turn derives his authority from Sobors or general conventions of the Church (10-11, 163).

From the time of Peter, no Sobors were permitted by the Czars (89). Peter abolished the office of Patriarch and vested supreme authority in a Sacred or Holy Synod, of which, his procurator, a lay functionary, was the chief official (88-9). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (10-11, 21). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, the Patriarchal Church was re-established (107, 164). The last Sobor was held in 1945 and the present Patriarch was then elected (164, 107-8). The canonical validity of this Sobor and the Patriarch's election is not questioned (31, 244, 246) and he is named in the prayers of the local churches (31). The Patriarch is in full communion with the Eastern Churches (107-108, 37).

The American Archdiocese

The Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire. When Alaska was ceded to this country, the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter, the church established a number of communities in this country and Canada (7, 11-12).

At first the Church here was called a Mission, then a Diocese, then an Archdiocese. The official name of the Archdiocese is "Archdiocese of the Aleutian Islands and of North America" (7, 236). It was a constituent part of the Russian Church at large (21, 164).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (12), then through its agent, the Archbishop, who was appointed by the Synod (12-13, 15) answerable exclusively to it and subject to suspension, removal, transfer or replacement at the pleasure of the Synod (15-16, 164).

Under Russian Church law, which remains unaffected by any changes in temporal power, the Archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is appointed only by the Supreme Authorities of the Church at large (20, 22, 25, 135-6). Thus, the enactments of the Sobor of 1917-18, which had "indisputable canonicity and validity" (302 N. Y. at 6), declare that "Bishops to the foreign missions shall be appointed by the Sacred Synod" (20). The American Diocese was and is a foreign mission (128). In point of fact, all the Archbishops who served here were in each instance *appointed* by the Supreme Authorities (16). Indeed, such appointments were, prior to 1917, by ukase of the Czar (89). The Diocese was governed not by the local churches or clergy but by the Archbishop, and he was answerable not to them, but to the Supreme Authorities who appointed him (15-16).

Relation Between the American Archdiocese and The Church at Large

An Orthodox Church is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has

no parts. It is a unity and, by hypothesis, no diocese or parish may of its own will leave the Church or consider itself a part of the Church and live "autonomously", without breaking the unity, the indivisibility, of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (165). And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing", cut themselves off from the church and all rights to its property (*Watson* v. *Jones*, 13 Wall. 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

This Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000. They contributed further substantial sums for its maintenance and upkeep (164, 14). "Some" money was raised locally (13).[2]

In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the Archbishop (164-5, 166,

[2] Title to the Cathedral was taken in the name of a New York corporation of which the Russian Ambassador and the Consul General of New York were the sole trustees (71-2, 229). That corporation, in 1916, transferred the deed to Archbishop Evdokim, who, in 1917, before he left for Russia, retransferred the deed to the grantor which, in 1925, without any consideration (160), gave the "title" to appellee (71-2, 73, 74-5, 204-6). The locus of the title is irrelevant. The right to occupy the Cathedral stems from canon law and not from the holder of the "title" who holds it subject to that law (*Watson* v. *Jones*, 13 Wall. at 720-2). Just as Archbishop Evdokim could not have been ousted by appellee's grantor, so his successor, Metropolitan Benjamin, may not be ousted by appellee, unless the statute may constitutionally so direct.

13, 17), and in the words of Bishop Leonte, appellee's witness, it "started as a Cathedral of Russia" (8).

The right of the duly accredited Archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, under the canon law of the Russian Church, as an attribute of his Episcopal office, to occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned. Even the majority acknowledge as much (302 N. Y. at 5-6).

The testimony of the witnesses is unanimous on that point (17, 164-5, 136). All the appointed archbishops have so occupied it (16-17). Occupancy of the Cathedral by any one other than the appointed archbishop would violate the canon law of the church (17, 165). Appellee Metropolitan Benjamin is the accredited Archbishop by virtue of his appointment to that office by the Patriarch (166, 127, 226). He has been occupying the Cathedral as such Archbishop since 1945 (136-7).

In *Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483, aff'd 242 N. Y. 547, which, in principle, is identical with the case at bar and, apart from the statute, is decisive of the case, it was held that, under the canon law of the Russian Church, Saint Nicholas Cathedral is held in trust for the exclusive use of the archbishop *appointed* by the Chief Authorities, and the Court awarded the Cathedral to such appointee against the claim of the archbishop *elected* by the metropolitan district.[3]

Notwithstanding the above, the majority say that the Cathedral was "dedicated to the use of all the members

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[3] The majority's attempt to emasculate this case (302 N. Y. at 12-13) must fail. Both parties there relied on the undisputed rule of canon law that the appointed archbishop is the *ex-officio* beneficiary of the Cathedral trust, and each claimed to be such appointee. Rojdesvensky's claim on the ground of appointment was rejected as a matter of fact. His claim on the ground of local election was rejected as a matter of canon law.

of the diocese" or was "dedicated to use of members of a parish and of a diocese (302 N. Y. at 4, 34). That is an *ad hoc* assertion which serves the theory[4] of the majority but is without any evidence to support it, is wholly arbitrary and is refuted by their own acknowledgment that the edifice was consecrated as a Cathedral. It ignores the interlocking status and relationship of the ruling archbishop of a diocese and its cathedral under the canon law, usages and discipline of all hierarchical churches. A cathedral in such a church is by definition the official residence, administrative headquarters and place of worship of the canonical archbishop; and its consecration as a cathedral means its dedication to such use and occupancy. By its baseless finding the majority convert the Russian Church from an hierarchal to a congregational body. Whatever undefined rights the faithful may have in the Cathedral, they are subordinate to the rights of the appointed archbishop and cannot include the right to oust him, because the Russian is not a congregational Church.[5]

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[4] The theory is in substance this: The members of the diocese are the "beneficiaries" of the Cathedral and the archbishop is its "trustee". By virtue of their supervisory power over "trustees", the legislature or the courts may "select" the "trustee" who will "more faithfully administer" the Cathedral for its beneficiaries (302 N. Y. at 22, 24). But, if we are to use terms inapposite here, the appointed archbishop is the beneficiary, not the trustee, and, since his occupancy of the Cathedral is required by canon law, the civil authority has no supervisory power over such an exercise of religion. An archbishop may not be barred from exercising his religion by calling him a "trustee".

[5] The status and relationship of Metropolitan Benjamin and Saint Nicholas Cathedral under the Patriarch are, for example, similar to the status and relationship of Cardinal Spellman (as Archbishop) and St. Patrick's Cathedral under the Pope, for similar reasons of canon law, usage and discipline, and the civil power has no more right to oust Metropolitan Benjamin from St. Nicholas Cathedral than it has to oust Cardinal Spellman (as Archbishop) from St. Patrick's Cathedral.

The Metropolitan District

In 1924, a "number" (24) of Russian churches [6] met in a convention in Detroit and declared themselves "temporarily" to be "a self-governed Church • • • governed by its own elected Archbishop" and elected Platon (Rojdesvensky) as their Archbishop (187-9).[7]

This "self-governed Church" is the "autonomous metropolitan district" which the statute calls the "Russian Church in America" (sec. 105). In 1934, Metropolitan Theophilus was elected head of the district to succeed Platon who had died in the meantime (25, 28). In 1936, the district subjected itself to the supreme authority of a Synod of Bishops, domiciled in Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside Russia (32-4, 238, 240). The district pledged "loyalty" to this Synod of Bishops (151-2, 243-4) which first sought the restoration of the Czar, then joined its fortunes to those of Hitler (144, 145-6, 33-4) and, with the liberation of Yugoslavia, followed him back to Germany (143-4, 32). The district continued under the authority of this Synod while Hitler was in control of Yugoslavia and, when the "Russian Church Abroad" had ceased to exist altogether (147, 243-4), withdrew from that organization in 1946 and

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[6] According to the *Kedrovsky* record, 160 of a total of 190 churches attended the Detroit convention. A number voted against autonomy (187-8). In 1945, the district claimed 358 churches (215) and, in 1948, only 250 churches (159), revealing a substantial split. The Patriarchate claimed that 50 churches adhered to it (130) and the district acknowledged that 13 did so (215).

[7] The majority rely on the self-serving speeches at Detroit (302 N. Y. at 11-12). The nub of the matter was stated by one speaker who said, "We ourselves establish church authority for ourselves" (183). But this was an impermissible breach of canon law. The civil courts are concerned not with the *why* but only with the *fact* of secession and its legal consequences (*Watson* v. *Jones*). The Christian Church would hardly have survived if a diocese were free to secede because of its displeasure at the course of events.

"resolved that His Beatitude Alexy, Patriarch of Moscow, and all Russia, be requested to continue us in his fold and be our Spiritual Head" on terms of autonomy (222).

The life history of the metropolitan district is this: In 1924 it withdrew from the Russian church at large; in 1936 it subjected itself to the authority of the Karlovitz Synod; and in 1946 it seceded from that organization and sought to rejoin the Patriarchate.

The Patriarch at all times took the position that the organization of the metropolitan district and the actions of Platon and Theophilus violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (165, 224-5, 147-8, 149) and placed Platon and Theophilus under suspension (165-6, 225).[8] Like rulings were made outlawing the Karlovitz Synod from the very beginning (141-3, 109-10).

Subsequent to the Sobor of 1945, where the present Patriarch was elected, negotiations for reunion between the Patriarch and the metropolitan district proceeded up to the date of trial in 1948 (131-3, 219-21). Representatives of the district had arrived one day too late to attend this Sobor (126), but, since the district was then under patriarchal suspension and was subject to the jurisdiction of the Karlovitz Synod, it had no canonical right of representation. However, they received from the Patriarch the ukase

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[8] The autonomy was not declared "pursuant" to the Patriarchal order of November 1920 (177-9), as the majority assert (302 N. Y. at 33). That order was not designed to liquidate the Russian Church. It was addressed to dioceses in Russia whose "activity * * * should stop" and who were cut off "for reasons of movement of the front" (177). It did not authorize secession, had no application to the American Diocese (43, 109, 139-40) and was not referred to in the resolutions at Detroit (187-9). Any action taken thereunder had to be confirmed by the Patriarch (179) and the acts of the metropolitan district were condemned (165-6, 189, 224, 141). The district did not rely on this order in the *Kedrovsky* trial and, only recently, partisans of the district have seized on this order as a belated after-thought to lend color of canonicity to the secession which took place independently of it.

of February 1945 as a basis for negotiations for reunion (127, 227-8).

In a highly self-serving manifesto (209-19), the leaders of the district rejected this ukase on the alleged ground that it demanded a pledge of loyalty by the American clergy to the Soviet government (216, 219). The claim was unfounded and Professor Feodotov acknowledged that the ukase made no such demand (157-8).[9] It requested "abstention" from political activities and the metropolitan district itself admonished its clergy in 1944 "for the general welfare, not to touch upon political questions and not to make any public speeches on the subject, especially from the pulpit" (216). The *membership* of the district saw in the ukase no such demand, for, in their 1946 convention, they requested the Patriarch to "continue us in his fold" on terms of autonomy (222). The subsequent negotiations foundered, not on the false claim of a demand for a pledge of loyalty, but, as the Appellate Division found, on the purely ecclesiastical question as to the scope of the patriarchal power to confirm locally elected bishops (276 App. Div. at 319-20).[10]

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[9] In this respect the manifesto followed the familiar propaganda technique of ascribing to an apponent unacceptable claims *not* made by him.

Since the alleged demand of such a pledge is the principal basis for the "determinative" ground of the decision below, we consider this issue at pp. 30-33 of this brief, *infra*.

[10] The canon law provides that where a Bishop may be elected locally, "his election shall be submitted to the confirmation of the Supreme Church Authority" (20, 136, 26-7). Such confirmation is indispensable to apostolic succession. Canonically, a priest cannot be "elected" a bishop, he is merely "elected" a candidate for confirmation and consecration by Higher Authority, and such an "election" is not binding on the Patriarch. Even the demands of the metropolitan district for full autonomy accepted and acknowleded the right of the Patriarch "to veto the election of the metropolitan or Bishops", but sought to limit the grounds of veto to those of canon law and morals (217-218).

Specification of Errors

The New York Court of Appeals erred in reversing the judgments in favor of appellants and awarding judgment in favor of appellee.

Appellants tender the following issues which have been included in the assignment of errors.

The Constitutional Issues Presented

1. Is the ouster, by force of the statute, of appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the retroactive application of the statute to the case at bar, which was commenced one day *before* the statute became law, a denial of due process?

4. Is the direction that the Trial Court exercise its "discretion" to determine if the appointed archbishop is a "proper trustee" or a "proper person" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

a). Is the use of the *Kedrovsky* record, as a basis of the decision against appellants, violative of due process?

5. Does the failure and refusal of the Court of Appeals to rule on the merits of appellant Benjamin's defense of the statute of limitations, while directing final judgment against him, violate due process?

Summary of Argument of Point I

The Russian Orthodox Church is an hierarchal church and its supreme authority is the Patriarch. The American Archdiocese is a constituent part of the Russian Church and is governed by an archbishop *appointed* by the Patriarch. The ruling by the Patriarch that the secession of the metropolitan district is canonically void is conclusive and binding here. St. Nicholas Cathedral was built by the central church for the exclusive use of its appointed archbishop as a place of worship, as his residence and his headquarters; its consecration as a Cathedral means its dedication to such use. Occupancy of the Cathedral by the appointed archbishop is required by canon law. Appellant Benjamin is the duly appointed archbishop and thus entitled to the possession of the Cathedral.

The compulsory statutory transfer of the Cathedral from the jurisdiction of the Patriarch to the jurisdiction of a locally elected archbishop and the ouster from the Cathedral of the patriarchally appointed archbishop, prohibits the "free exercise" of religion by the Patriarchal Church and its archbishop, interferes in the internal affairs of that church and nullifies its canon law, in contravention of the First Amendment, made applicable to the States, by the Fourteenth.

The alleged "finding" that the Patriarchal Church is not "free", is arbitrary, without any factual support and may not be based on judicial notice. The statute makes no such finding and it may not be ascribed to it by "presumption". In any event, it cannot furnish justification for restraints on religious liberty.

POINT I

The statute, as construed and applied by the Court of Appeals, constitutes an abridgment of freedom of religion guaranteed by the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth.

A. The First Amendment withdraws from the civil power the entire field of religion and the internal government of all religious societies.

It is now settled that the Fourteenth Amendment makes applicable to the states the command of the First Amendment that Congress shall "make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *" (*McCollum* v. *Board of Education*, 333 U. S. 203, 209-12; *Everson* v. *Board of Education*, 330 U. S. 1, 8).

What is prohibited is not merely the establishment of a *Church* but any "law *respecting* (*i.e.*, dealing with, relating to, regarding) an establishment of religion or prohibiting the free exercise thereof", *i.e.*, of religion. In other words, the whole field of religion is placed beyond the reach of the civil power. In his famous Memorial and Remonstrance, Madison said: "Religion is wholly exempt * * * from the authority of the Society at large" (Appendix I to dissent of Justice Rutledge in *Everson, supra*, pp. 64-5). Responding to a request that he proclaim a national fast day, Jefferson wrote: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises" (Moehlman: *The Wall of Separation Between Church and State*, p. 102). Writing to the Danbury Baptists Association, Jefferson said that he contemplates "with sovereign reverence" the constitutional guarantee of religious liberty which built "a wall of separation between church and state" (*Moehlman, supra*, p. 108).

After Christianity became the exclusive religion of the Roman state, the Church not only sought to suppress

heresy, but, after the fall of Rome, as the residuary legatee of the Roman Empire, claimed supremacy in secular affairs also.[11]

The Protestant Revolution replaced Papal Supremacy with the Royal Prerogative.[12] Although the Reformation was based on the right of private judgment in religion, it established new orthodoxies which engendered new persecutions and many of its victims settled in the Colonies, where they planted the seeds of the religious persecutions from which they had fled.

The Founding Fathers sought to rescue the nascent Republic from the ills that had afflicted the old world resulting from the rival claims of Church and State, and, in view of the numerous religious sects and denominations in the Colonies, embroilment in religious disputes might have been fatal to the early Republic.[13] They believed in the *principle* of religious liberty and in the *policy* of complete separation of Church and State, of City and Temple, as the best method of preserving liberty and ensuring domestic peace. That was the philosophy of the First Amendment and it was based on the primal principle promulgated by Jesus, "to

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[11] "According to Innocent, the Pope is lord of earthly states as well as of the Church. Princes, like Bishops, are his agents, charged with the duty of carrying out his will" (McGiffert, *History of Christian Thought*, Vol. 2, pp. 339, 334-41). The theoretical foundations for this position were laid by St. Augustine (Gettell, *History of Political Thought*, pp. 88-91; see also Stokes, *Church and State in the United States*, Vol. I, pp. 39-41).

[12] Hobbes in England and later Hegel in Germany assigned to the state the same authority as St. Augustine claimed for the church. This doctrine is called Erastianism (Rommen, *The State in Catholic Thought*, pp. 65, 61).

[13] "Half the wars of Europe, half the internal troubles that have vexed European States, from the Monophysite controversies in the Roman Empire of the fifth century down to the Kulturkampf in the German Empire of the nineteenth, have arisen from theological differences or from the rival claims of Church and State. This whole vast chapter of debate and strife has remained virtually unopened in the United States." (Bryce, *The American Commonwealth*, Vol. 2,

render unto Caesar what is Caesar's, and to God what is God's" (Stokes, *Church and State in the United States*, Vol. III, pp. 694-5; Vol. I, pp. 28, 37).

This Court has characterized freedom of religion as "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U. S. 319, 325); it has assigned to it a "preferred" position among our basic liberties (*Marsh* v. *Alabama*, 326 U. S. 501, 509; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follett* v. *McCormick*, 321 U. S. 573, 577); it has invested the freedoms protected by the First Amendment with a "sanctity and sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 530); it has declared that where a statute touches an area protected by the First Amendment, the presumption is *against* its validity (*West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, note 4). Justice Murphy, dissenting in *Prince* v. *Massachusetts* (321 U. S. 158) said that the freedoms of the First Amendment "are presumed to be invulnerable" and any attempt to curtail them "is *prima facie* invalid" (p. 173).[14] See also *Busey* v. *District of Columbia* (138 Fed. (2d) 592, 595).

This Court has recently given expression to the principles which give religious freedom constitutional immunity from invasion by the civil power.

In *Everson* v. *Board of Education*, 330 U. S. 1, this Court said:

> (p. 15) "The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a

[14] The majority below erroneously apply to Article 5-C the rule of presumption generally applicable to statutes concerned with commercial or secular activities (302 N. Y. at 30-33). Even so, this inapplicable presumption does not save the statute for there is no "rational" connection between occupancy of the Cathedral by the appointed archbishop and any interest the state may protect, or any imminent danger to the state.

> church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. * * * Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice-versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

The constitutional guarantee of religious freedom means, the Court further said, that the state shall be "neutral" in the field of religion and shall not "favor" or "handicap" one church as against another (p. 18).

McCollum v. *Board of Education*, 333 U. S. 203, reaffirmed the principles of the *Everson* case, and said:

> (p. 212) "For the First Amendment rests upon the premises that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective spheres. Or, as we said in the *Everson* case, the First Amendment has erected a wall between church and state which must be kept high and impregnable."

In his concurring opinion, Mr. Justice Frankfurter cited with approval the statement of Judge Jeremiah S. Black (note 8, p. 219):

> "The manifest object of the men who framed the institutions of this country was to have a *State without religion* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other" (italics in original).

Dissenting in *Everson*, Justice Jackson said that religious freedom "was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms and its strength is its rigidity. It was

intended not only to keep the State's hands out of religion, but to keep religion's hands off the State" (p. 26).

The constitutional guaranty not only protects religious belief, but also the "free exercise thereof". In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court defined the "double aspect" of the constitutional guaranty as "freedom to believe and freedom to act", saying:

> (p. 303) "On the one hand, it forestalls compulsion by law of acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to *adhere to such religious organization* or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free *exercise* of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act" (italics added).

In other words, the government of a Church—its internal management as well as its creed—is within constitutional protection.

Representative applications of these principles are found in the following cases:

Pierce v. *Society of Sisters*, 268 U. S. 510, held violative of religious liberty, a statute requiring the attendance in public schools of children who wished to attend parochial schools. Allied in principle is *Meyers* v. *Nebraska*, 262 U. S. 390, which held violative of protected liberty a statute forbidding the teaching of foreign languages in parochial schools to any child below the eighth grade.

This Court held restrictive of protected religious liberty regulations of states or cities which (a) taxed the sale of religious literature by itinerant salesman (*Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *McCormick*, 321 U. S. 573); (b) forbade the ringing of doorbells or knocking on doors in private dwellings to distribute religious literature (*Martin* v. *Struthers*, 319

U. S. 141; (c) required a permit to distribute religious literature on public streets (*Lovell* v. *Griffin*, 303 U. S. 444), or to solicit on public streets contributions for religious purposes (*Cantwell* v. *Connecticut*, 310 U. S. 296), or to preach in public areas (*Kunz* v. *New York*, 340 U. S. 290), or to conduct a religious meeting in a public park (*Niemotko* v. *Maryland*, 340 U. S. 268); (d) or forbade the distribution of religious literature on the private property of a company town (*Marsh* v. *Alabama*, 326 U. S. 501) or on Government property (*Tucker* v. *Texas*, 326 U. S. 517).

West Virginia School Board of Education v. *Barnette*, 319 U. S. 624, condemned, as an invasion of religious liberty, a requirement that children salute the flag in public schools.

McCollum v. *Board of Education*, 333 U. S. 203, barred the State from using its public school facilities to aid a program of released time for religious instruction of children.

In the foregoing cases (except *McCollum*, which involved State aid to religion) this Court protected religious freedom as the paramount value, notwithstanding that its exercise conflicted with other social interests, such as the right of privacy and freedom from trespass, and the need of the State to regulate the use of public areas, to raise revenue, to inculcate patriotism and to promote national unity.

In our case, occupancy of the Cathedral by Metropolitan Benjamin—an exercise of his religion—does not conflict with any rights of others. It involves merely the government and discipline—the internal affairs—of a church, and in such a case, the controlling principle was expressed by Mr. Justice Jackson in *Prince* v. *Massachusetts*, 321 U. S. 158, when he said:

> (p. 177) "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

Particularly in point here is the landmark case of *Watson* v. *Jones*, 13 Wall. 679, where this Court emphasized the incapacity of the civil power to sit in judgment on the actions of religious bodies or to interfere in their internal affairs. It quoted with approval the following:

> (p. 730) "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here. * * *"

This Court also pointed out that in view of the fundamental principle of separation of church and state, our legal tribunals must accept as "final" and "binding" the acts, decisions and determinations of the chief authorities of an hierarchal church respecting any "questions of discipline * * * or ecclesiastical rule, custom or law" (at 727-8); that matters of "church discipline" and "ecclesiastical government" are outside the range of the civil power (at 733). The ruling was that a subordinate body of the Presbyterian Church may not, because it favored slavery which the chief authorities had condemned, lawfully secede and, if it does, its property remains subject to the jurisdiction of the central church (p. 734). In our case, the Patriarch is not claiming any churches which seceded, but the seceders want to take over the Cathedral, which is subject to the central church.

We thus see that this Court has been zealous to keep an exercise of religion and the governance of churches immune from the civil power, whatever be the form or method of attempted invasion.

B. The statute, by compelling the transfer of St. Nicholas Cathedral from the jurisdiction of the Patriarch to that of a locally elected archbishop and by compelling the ouster from possession of the Cathedral, required by canon law, by the patriarchal archbishop, violates the constitutional guarantees of religious liberty.

Turning to the case at bar, Article 5-C, as construed and applied here,[15] is, we submit, a gross and direct interference with religious liberty, violative of the First and Fourteenth Amendments.

We do not have here a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantive interest of the state" (*Cantwell* v. *Connecticut*, 310 U. S. at 311), but a general statute outlawing a Church in its entirety.

The canon law of the Russian Church says that the archbishop appointed by the Patriarch must occupy St. Nicholas Cathedral. The statute says no; the archbishop elected by a seceding group of churches shall do so and, as a consequence, the accredited archbishop is ousted from possession and is barred from conducting *religious* services in the Cathedral.

The canon law says that a mission or diocese of the Russian Church, such as the American Archdiocese, is subject to the ecclesiastical government of the chief authorities and may not canonically secede from the Church. The statute not only sanctions this but awards the Cathedral to the seceders, contrary to *Watson* v. *Jones*.

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[15] Actually, the statute expressly limits itself to that "group" of churches which "now constitute" the metropolitan district (sec. 105), and further limits itself to such "incorporated" churches (sec. 107). Thus, *unincorporated* churches, even those which belong to the district, lie outside the coverage of sec. 107. Yet, by the use of unfounded "presumptions", the majority read into the statute a "mandate" for the compulsory subsection to the metropolitan district of patriarchal churches, including the Cathedral. The majority discover in the statute what they put into it. However, we must read the statute with the gloss they impose on it, however unjustified it be.

The canon law says that a bishop shall be appointed by the chief authorities of the church or, if locally elected, shall be confirmed and consecrated by higher authority, so that the chain of apostolic succession may not be broken. The statute requires all Russian churches, even though they question the regularity of the apostolic succession of the elected, but unconfirmed (26,28), archbishop of the seceders, to "recognize and be and remain subject to the jurisdiction and authority" of the seceders and such elected, but unconfirmed, archbishop.

A statute that commands that a church "shall recognize and be and remain subject to the jurisdiction and authority" of one church instead of another, of one archbishop instead of another, is unconstitutional on its face.

A statute that says that "every" Russian church and all its properties "shall be and remain subject to the jurisdiction" of the metropolitan district and its elected archbishop, dispossess the Patriarchal Church from all its properties, prevents any of its churches from existing in this state, and prohibits the free exercise of religion by that church.

The statute not only *prohibits* the exercise of their religion by the Patriarchal churches, but *compels* them to accept the jurisdiction of a rival church.

By this statute, the civil power departs from its position of "neutrality" in the field of religion and "prefers" the seceding group to the total exclusion of the Patriarchal Church.

The statute literally establishes the metropolitan district as the official or orthodox Russian Orthodox Church in this state—an express violation of the First Amendment, which declares that the state "shall make no law respecting an establishment of religion * * *."

The edict of Milan issued in 313 A. D. by Constantine, the first Christian Emperor of the Roman Empire, granted

> "both to the Christians and to all others, free power of following whatever religion each may have pre-

> ferred. * * * The absolute power is to be denied to no one to give himself either to the religion of the Christians, or to that religion which he thinks most suited to himself" (*Drozda* v. *Bassos*, 260 App. Div. 408, 411).

The majority denies Russian churches in the State of New York a freedom of affiliation which even the Roman Emperors allowed.

Parliament, in Elizabeth's time, decreed that "the Bishop of Rome hath no jurisdiction in this realm of England" (5 Encyclopedia Britannica, p. 673). The statute here, in effect, says that the Patriarch of Moscow hath no jurisdiction in the State of New York and, if this be permitted, in principle and logic, New York can also deny jurisdiction to the Bishop of Rome, the Patriarch of Constantinople, or any other Hierarch or Church. It was just such an exercise of power over religion by the State that the First Amendment was designed to forbid.

The official name of the Eastern Church is "The Holy Orthodox Catholic Apostolic Eastern Church." The Russian Orthodox Church is an integral, though autocephalous, part of this Catholic and Apostolic Church. The traditional position of the Russian Orthodox Church is that it is apostolic in origin and descent, that this apostolic succession is preserved through the institution of its Ecclesiastical Hierarchy in an unbroken succession from Christ and His disciples, that its bishops have been consecrated by those duly qualified and duly authorized by Higher Authority to perform this sacrament, and that there must be no defect anywhere in the line of descent for the transmission of grace.

Many believe, and with reason, that the metropolitan district lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (26, 28, 165-6), and he is

now under canonical suspension. That the metropolitan district itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (Defendants Exhibit I, 242-7). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the metropolitan district had subjected itself to the Karlovitz Synod, on the theory that that body was a canonical hierarchy, but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken (244), and the metropolitan district is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a district whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

We thus see that the statute, as construed and applied, penetrates the field of religious liberty on a deeper and wider front than any legislation heretofore attempted. In the words of the dissenting judges (302 N. Y. at 39), the statute, as construed by the majority,

> "had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whole group and all its properties under the control of the new schismatic 'Russian Church of America', and, specifically, of mandating the ouster of the patriarchally appointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional."

It is also wholly unprecedented. "No other decision reaching such a result can be found in the books" (302 N. Y. at 36).

C. The proffered justification for the statute—the "determinative" finding that the Patriarchate is not "free"—is inadmissible.

Assuming that there can ever be justification for interference with religious liberty by the state,[16] what justification is there in this case for this intrusion into the field of conscience?

The majority make a finding, which they characterize as "determinative" (302 N. Y. at 22), that the Patriarchal Church is not "free", is not "a true religious body" and is "a tool" of the Soviet Government (302 N. Y. at 35, 22, 30, 33), ascribe this finding to the Legislature by "presumption" (302 N. Y. at 30, 33) and see in this "presumed finding" constitutional sanction for the compulsory transfer of the Cathedral from the jurisdiction of the Patriarch to that of the elected archbishop of the metropolitan district (302 N. Y. at 30).[17]

This "determinative" thesis, simply stated, is that since the Patriarchal Church is not "free", therefore—any conclusion whatever. That pregnant premise removes all

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[16] *Prince* v. *Massachusetts*, 321 U. S. 158, sustained, as a measure to protect adolescents, a statute, void if applied to adults, prohibiting the sale of religious literature on the streets by girls under 18 and boys under 12 years of age. *Reynolds* v. *United States*, 98 U. S. 145, and *Davis* v. *Beason*, 133 U. S. 333, held that polygamy, which was a crime at common law and was "odious" to western civilization, could be prohibited by statute and that members of the Mormon Church could not practice polygamy, and thereby commit bigamy, in the name of religion.

[17] The euphemism employed by the majority is that the statute made a "determination" that the metropolitan district is "the authentic group, as of today, entitled to the administration" of all Russian churches and the "proper trustee" thereof (302 N. Y. at 30, 21, 24). Nevertheless, they say that patriarchal churches founded *after* 1924 are not covered by the statute (302 N. Y. at 29; see this brief, pp. 37-8, *infra*).

legal barriers and restraints of precedent to "free decision" by the majority to reach any desired result. Since the Patriarchate is not "free", *Watson* v. *Jones*, the principle of non-interference in the internal affairs of a religious society, are irrelevant, the canon law of the Russian Church is nullified, its appointed archbishop is thrust aside, and other "trustees" and "beneficiaries" of the Cathedral are sought out, more agreeable to the civil court. Here, indeed, is a rare and novel doctrine and theory of decision, whereby a Court, on its own motion, may suppress *any* church whatsoever, disregard its canon law, reorganize its internal government, because it disapproves of the relation between the chief authorities of a church and the civil power of its domicile. Today it is the Patriarchal Church that falls victim to this theory, tomorrow it may be another.

1. The finding that the Patriarchate is not "free" is arbitrary, without evidentiary support and contrary to the evidence and findings of the triers of the facts.

This finding has no basis in fact and is wholly arbitrary.[18] It was made on the Court's own motion, beyond its jurisdiction competence,[19] in defiance of contrary evi-

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[18] This court is not bound by the majority's assertions or conclusions of facts. In *Feiner* v. *United States*, 340 U. S. 315, the Chief Justice said (p. 316): "In the review of state decisions where First Amendment rights are drawn in question we of course make an examination of the evidence to ascertain independently whether the right has been violated." See also *Niemotko* v. *Maryland*, 340 U. S. 268, 271, and *Watts* v. *Indiana*, 338 U. S. 49, 51.

[19] Appellee did not raise this issue at the trial, as the record shows (148-9). It was imported into the case by the minority in the Appellate Division (276 App. Div. at 318), and was later adopted by the majority in the Court of Appeals. Such a finding is beyond the jurisdictional competence of that Court which, with exceptions not material here, has no power to make independent findings of fact, and is limited to rulings on questions of law only. (Constitution of the State of New York, art. 6, sec. 7; New York Civil Practice Act, sec. 605.)

dence in the record and contrary findings by the triers of the facts (276 App. Div. at 319-20).[20]

None of appellee's witnesses gave any testimony that the Patriarchate was not "free" or was not a "true religious body". On the contrary, Professor Feodotov's memorandum acknowledged the canonical continuity and the restoration of the full authority of the Patriarchate and urged reunion with that church (242-6, 106-7, 31). He accepted, as correct, the assertion of the Patriarch that "Our Russian Church has not been led astray. * * * It has kept unsullied its canonical consciousness and at the same time its correct and canonical supreme direction—that is, its part in the life of grace of the Ecumenical Church and its right place in the harmony of the Orthodox Autocephalous Churches" (102-3, 104). In 1946, the metropolitan district itself resolved that "His Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" on terms of autonomy. Patriarch Sergius emphasized the "contradiction" between the Russian church and the Bolshevik regime (207) and Metropolitan Gregory testified, without being cross-examined (167), that the Patriarchal Church "is functioning freely as an Orthodox Church, without interference by the civil authorities" (167). There is not a word of evidence to the contrary.

2. The finding that the Patriarchate is not "free" may not be made by judicial notice.

This "determinative" finding is based on "judicial notice" of "historical facts" (302 N. Y. at 21, 23, 34), in spite of the above contrary evidence and findings, and notwithstanding that a substantial body of informed and non-partisan opinion supports a different view. (See chap-

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[20] This, says the dissent (302 N. Y. at 37), "amounts to a *new* finding by this Court, *without evidentiary* support in this record and in the *face of contrary* testimony and *express contrary findings* by both Courts below" (italics added).

ter on *"Religion in the Soviet Union"*, pp. 127-32, in House Document #754, published in 1946, prepared by the Library of Congress; Casey, *"Religion in Russia"*, pp. 178, 182-90, Harper & Bros., 1946; Bolshakoff, *"The Christian Church and the Soviet State"*, p. 55, MacMillan & Co., 1942; Timasheff (Professor at Fordham), *"The Great Retreat"*, pp. 227, 237, Dutton & Co., 1946; Anderson, *"People, Church and State in Modern Russia"*, pp. 214, 89-94, MacMillan & Co,. 1944.) Mr. Anderson says (p. 214) that the Russian Church "desires to be and feels itself to be the Church of the *Russian people,* not the Church of the *Soviet State"* (italics added). Former Ambassador Smith, in his, *"My Three Years in Moscow"*, Harper & Bros., 1950, states that "while the Communist Party has been successful in retaining that which is Caesar's, its direct efforts to capture also that which is God's, has been quietly but decisively rejected by the masses of the older Russian people" (pp. 264-5). He also refers to the "mysterious" power of religion in Russia which "is impelled by forces and governed by laws of its own which not even the Kremlin understands" (p. 279), and observes that a danger to the Russian Church lies in being isolated from the West (pp. 264-5). Fuller documentation on this issue is given in Appendix B hereto attached.

In such a case, findings by judicial notice, which gives only "limited illumination", are improper. Judicial notice may be taken only of matters which are capable of "instant and unquestionable demonstration" (Wigmore on *Evidence,* vol. IX, Secs. 2571, 2565). Where controversy exists as to an issue or where a claim may be disputed by competent evidence, judicial notice is inappropriate. Professor Morgan, in *"Judicial Notice"*, 57 Harvard Law Rev. 269, says:

> (pp. 292-3) "There is danger of misuse and abuse of judicial notice * * *. He (the judge) may treat a half-truth as though it were the whole truth. * * * Consequently, protection to litigants should be pro-

vided (a) by furnishing them full opportunity to be heard in time to make their contentions effective and to make a record which will assure review by appellate tribunals and (b) by using judicial notice only when the matter clearly falls within the domain of the indisputable."

Here, the majority violated this rule in both respects. They applied judicial notice in the domain, not of the indisputable, but of the highly controversial, and did this notwithstanding that the issue was not raised at the trial.

3. There was no demand for a "pledge of loyalty" by the clergy abroad to the Soviet State.

Upon what ground then do the majority assert that the Patriarchate is not "free"? They point (a) to the imprisonment of the Patriarch—in 1923, (b) the emergence of the Living Church—which disappeared in 1925 (164, 42), and (c) the alleged demand for a "pledge of loyalty" in 1927 when the Patriarchate was restored (302 N. Y. at 23, 15). Only the last claim need be considered.

There is no proof whatever to support the assertion of the majority that the Patriarch attempted to "exact" or promised to "secure" from the clergy abroad a pledge of loyalty to the Soviet State, let alone such a "written" pledge, as Judge Conway asserts (302 N. Y. at 15). This is an arbitrary assertion without any factual support whatever.

4. The alleged "pledge of loyalty" by Patriarch Sergius to the Soviet State in 1927 does not show that the Patriarchate is not "free".

a) Patriarch Sergius, we submit, was addressing the Russian clergy in 1927 when he spoke of "our sincere readiness to be law abiding citizens of the Soviet Union, loyal to its government * * *", at the same time em-

phasizing that "we cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (207).

A student of church history will recognize this as a statement of the classic position of the Christian Church with respect to any political or economic system. It is in full harmony with the recent pronouncement of His Holiness, Pope Pius, wherein he said that the Church "does not meddle in problems purely political and economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 1949, p. 3; see also Dunning, *History of Political Theories*, pp. 152-3). The Patriarch had, at first, anathematized the revolution (101), but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches are—they must be—"loyal" to the Caesar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" an exemplary citizen of "any" state "including that of the Soviets" (207).[21] Christians are also citizens and must obey their rulers—even non-Christian rulers. "Obedience to the state was demanded as a religious obligation as well as a political necessity" (Gettell, *History of Political Thought*, p. 87; Rommen, *supra*, pp. 12, 583). We respectfully submit that the position of Patriarch Sergius is in full conformity with Christian tradition.

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[21] Metropolitan Benjamin also testified that the policy of the Church was that of "refraining from politics only * * * both in the Church and in the name of Church" (114, 122), that "you may criticize the Soviet government, but only as private men" (123), that this was "an expression of the Christian attitude to the government" (123), that it was its duty to preach the Gospel but "not politics" (124), that this policy was for "the good of the church" (125), and that the "answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligations and does not demand it" (124).

The Christian Church, regarding itself eternal, appraises temporal events *sub specie aeternitatis*. The Church knows that it has to live, if not under, at least with Caesar. The Church has seen Caesars come and go and it survives because it makes its terms with the Caesar of the moment, not to serve him, but to serve the long range interests of the Church. The Pope made a treaty with Mussolini [22] and the Patriarch with the Soviet and neither Church may be punished by our civil authorities on that account.

b) When is a church "free"? Was the Papacy free in Avignon? Was the Catholic Church free under Mussolini? The Protestant Church under Hitler? Is the Catholic Church free in Spain? Was the Karlovitz Synod, which the metropolitan district accepted as its higher church authority from 1936 to 1946, free when Hitler ruled Yugoslavia? In a theorcracy does the state govern religion or religion the state?

Was the Russian Church free under the Czars? The majority apparently think so, for they regard the archbishops of the American Archdiocese, appointed prior to 1917, as "in proper and direct canonical succession" (302 N. Y. at 6). But under the Czar, the Church was more than "loyal" to the government. It was a State Church, subsidized by the regime (100, Pares, *Russia and the Peace*, pp. 34-37). The Czar's procurator dominated the Synod (88-9, Curtiss, *Church and State in Russia*, pp. 52-54). The bishops took an oath of loyalty to the Czar (Fortescue, *The Orthodox Eastern Church*, p. 296). It was the Czar who appointed the archbishops of the American Archdiocese (89). Would a group or even all of the

[22] By Article 20 of the Lateran Concordat of 1929, all Bishops took "an oath of fealty to the Head of the State" and swore and promised to respect and make the clergy respect the government and to "avoid any course that may injure" the Italian State (*Italy Today*, 1929, New York Public Library). Rommen, *supra*, says that many Concordats gave the civil authorities "a certain influence upon the appointments of bishops" (573).

Russian churches in America have been permitted, prior to the Revolution, on democratic grounds, on the ground that there was no "political freedom" in Russia, that the Church was not "free", that it was a "tool" of the Czar, etc., to secede—and take with them the Cathedral which was the property of the Church at large?

The fundamental fact is that the *nature* of the civil power in Russia, whether that of Czar or Commissar, and the relation of the Church with that power, have nothing whatever to do with the canon law of the church and the administration here of the internal affairs of the church in accordance with that law. The relationship between Church and State is a matter of high church policy to be determined by the Chief Authorities of the church and such policy is conclusive upon all the members of the church and upon the civil power in all matters affecting the church and its members (134). Our Courts have no power to pass upon the propriety of the policies or the acts of the Patriarch; they have "no power or right to adjudicate that the incumbent is no true Patriarch. * * * The Patriarch, like all men, must account for his stewardship, but not to the New York courts" (302 N. Y. at 38).

5. The finding that the Patriarchate is not "free" may not be read into the statute by presumption.

Nor can such a finding be ascribed to the legislature by "presumption" (see *Thornhill* v. *Alabama*, 310 U. S. 88, 95-6). As we have seen, a statute touching religious liberty cannot be saved by presumptions. In the *Barnette* case (319 U. S. 624) this Court said:

> (p. 639) "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. * * * The right of a state to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may

have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

With respect to restrictions on First Amendment freedoms, this Court also said in *Thomas* v. *Collins* (323 U. S. 516) that the "rational connection between the remedy provided and the evil to be curbred, which in other contexts might support legislation against attack on due process grounds, will not suffice" (p. 530).

Busey v. *District of Columbia*, 138 Fed. (2) 592, held that the existence of facts justifying a tax on the sale of religious tracts will not be "presumed" and that the burden is cast on those who seek to uphold the tax to establish the facts which would justify it (p. 595).

In any event, the asserted "presumption" in the case at bar has no factual support whatever and is wholly arbitrary and fictional.

6. The legislature did not find that Patriarchate is not "free" and the "presumption" that it did is wholly arbitrary and fictional.

What was the attitude of the legislature toward the Patriarchal Church in 1945 when Article 5-C was passed? On that point, we have no direct evidence from findings, declarations of policy or legislative hearings. However, we do know that in April 1945 the World War had not yet terminated, that the United States and the Soviet Union were still allies, that not even the beginnings of the present tensions were then discernible, that, just two years before, in 1943, the legislature had by Article XV and section 15 of Article 2 of the Religious Corporations Law, chosen the Patriarchal Church intsead of the metropolitan district, as one of the four "primary" Orthodox

jurisdictions in the state of New York, that Governor Dewey had publicly acknowledged Metropolitan Benjamin, the present appellee, as "the living successor" of the traditional, accredited archbishops of the American Archdiocese (302 N. Y. at 44), and that the metropolitan district was then subject to the Karlovitz Synod, which had been allied with Hitler. In such circumstances, the suppression of the Patriarchal Church and the compulsory transfer of its churches to the metropolitan district, would have been wholly arbitrary, indeed, inexplicable.

Judge Conway states that "in passing upon matters of legislative * * * competence, the courts read the statute in the light of facts which were found by the legislature * * *" and that "the legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the Patriarchate in the Soviet system" (302 N. Y. at 31, 33).

But the legislature made no "findings" of facts. It's a pure fiction that it did. And the statute should be read in the climate of opinion of 1945 when the statute was passed and not in the light of the agitated opinion of today. The observations of Mrs. McCormick and Ambassador Smith were published in 1950 and, without conceding that they support the position of the majority, the legislature could hardly have known them 5 years earlier. Such a reading of the present into the past should not have been attempted by a terrestrial court.

Judge Conway recites various facts which he says the legislature in 1945 is "deemed" to have known and on the strength of which it is alleged to have outlawed the Patriarchal Church (302 N. Y. at 32-33). But precisely the same facts were before the legislature in 1943 when it selected the Patriarchal Church and not the metropolitan district as one of the four primary Orthodox jurisdictions in the state of New York. No facts are presented—and his-

tory records none—showing that the legislature had reversed in 1945 the favorable opinion of the Patriarchal Church which it held in 1943. Such a revolutionary reversal in opinion in so short a time must have some basis in fact, but the majority offer none, except a "presumption" that what did *not* occur, did occur.

D. The "presumed" finding that the Patriarchate is not "free" furnishes no constitutional justification for the suppression of that Church.

But assuming that the legislature may be "presumed" to have made such a finding with respect to the Patriarchate, could it constitutionally outlaw that Church for such a reason?

The implications of such a position are far reaching indeed.

Is it within the constitutional competence of the legislature to pass judgment on matters of this kind? Has the legislature the power to suppress a church, because it disapproves of the "politics" of the chief Hierarch? Is not the minority below right in saying that a statute which purports to do this is unconstitutional beyond dispute?

Let us examine *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, which is the *only* case cited by the majority in support of their constitutional position. Section 9 (h) of the Management Labor Relations Act, withheld the facilities of the Act from those unions whose officers failed to file with the Labor Board an affidavit to the effect that they were not members of the Communist party. Chief Justice Vinson, for the majority, stressed the fact that, after investigations before committees of Congress, including the committee immediately concerned with labor legislation, it was established by a "great mass of material" and "substantial amounts of evidence", that Communist leaders of labor unions had fomented "political" strikes in

interstate commerce, that it was the intention of Congress, expressed in the declaration of policy in the Act,[23] to curb such political strikes and other kinds of *direct action* and that the remedy proposed by Section 9 (h) bore a reasonable relation to the evil which Congress sought to and had the power to curb, namely, obstructions to commerce by political strikes (339 U. S. at 387, 389, 390-1).

Holding that "beliefs are inviolate" (p. 393), the court further observed that Congress did not restrain the activities of the Communist party as a political organization, did not bar Communists from employment or membership in unions, did not "attempt to stifle belief" (p. 404), but only to prevent illegal *action* (p. 396); that the effect of the statute on the exercise of basic freedoms was indirect, conditional and partial (p. 399), was "relatively small", touching only a "relative handful of persons" (pp. 397, 404). Indeed, under Section 9 (h) Communists can lawfully be *officers* of unions; the only penalty in such case being, that such unions may not enjoy the benefits of the Act. Concurring and dissenting in part, Justice Jackson admonishes us "to lay hold of the citizen when he acts illegally" and "to let his mind alone" (p. 444).

Where in our case are the investigations, the hearings, the findings and declarations of policy, the "mass", the "substantial amounts" of evidence, showing that the Patriarchal Church, sanctioned and approved in 1943, had become an evil in 1945, which the legislature sought to suppress? There is not a shred of evidence that the Patriarchal Church had *done* anything in this state justifying its proscription or that the legislature ever intended anything even remotely resembling suppression.

According to the majority, the statute subjects to the compulsory jurisdiction of the metropolitan district and its elected archbishop *only* those patriarchal churches

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[23] Notwithstanding the above, Judge Conway says (302 N. Y. at 31) that in the *Douds* case Congress *"was assumed"* to have *"found as a fact"* the *"existence"* of the specific evil there involved (italics in original).

which were established *before* 1924 (302 N. Y. at 29), leaving those churches established *after* 1924 free to adhere to the Patriarch.[24] This concession renders meaningless the postulated rationale of the statute, for no proper reason can be advanced for differentiating Russian churches established *before* 1924 from those established *after* that date. Since Article 5-C deals solely with *incorporated* Russian churches (sec. 107) (the number of which is unknown), the proferred constitutional justification for the statute then comes to this: we are to "presume" that the legislature made a "finding" that the Patriarchal Church is not "free", is not a "true" religious body, is a "tool" of the Soviet Government; consequently, the legislature suppressed only those *incorporated* patriarchal churches which were established *before* 1924!

Since the statute in no way touches the Patriarchal Church, a construction that suppresses that church is *necessarily* arbitrary and capricious, *necessarily* rests on fictional assumptions. and *necessarily* resorts to "presumptions" of imaginary "findings", "determinations" and "mandates", which are read into the statute to justify the initial error. The majority thus violate the basic principle known as Occam's razor which says that "Entities are not to be multiplied without necessity" or "It is vain to do with more what can be done with fewer" (Russell, *History of Western Philosophy*, p. 472).

The position of the majority is based on pure fancy—on an unfounded "presumption" of a non-existing "finding" of an imaginary "evil" to be cured by a wholly inappropriate remedy.

Freedom of religion may not be thus struck down.

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[24] Thus Judge Conway says that the "statute was intended to apply to those Russian Orthodox churches founded and established *before* 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established *after* 1924 for the purpose of adhering and being subject to the autonomous metropolitan district" (302 N. Y. at 29, italics added).

E. Assuming the clear and present danger rule is applicable, the statute fails to meet the test of this rule.

This Court has sustained restraints on speech which created a clear and present danger of some *act* or *conduct* which the government had specifically condemned as an evil,[25] such as: military insubordination and obstruction of the draft (*Schenck* v. *United States*, 249 U. S. 47; *Schaefer* v. *United States*, 251 U. S. 466); interference with the war effort (*Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239); the attempt to overthrow by violence our economic system (*Whitney* v. *California*, 274 U. S. 357) or our political system (*Dennis* v. *United States*, 341 U. S. 494).[26]

Assuming *arguendo* only,[27] that this rule is applicable here, it is manifest that the statute cannot survive the test of the rule.

Here the Patriarchal Church has not advocated the commission of any *act* which the State of New York has condemned or can condemn. Occupancy of St. Nicholas Cathedral by its appointed archbishop is not unlawful and cannot possibly be deemed a danger to the State so

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[25] In *Bridges* v. *California* (314 U. S. 252) the requirement was (p. 263) "that the substantive evil must be *extremely serious* and the degree of imminence *extremely high* before the utterances could be punished" (italics added). As early as *Abrams*, Justice Holmes, the author of the rule, dissenting there, said that to be punished, the speech must produce "a clear and *imminent* danger that it will bring about *forthwith*" (250 U. S. at 627) the evil which was condemned (italics added).

[26] Cf. *Fisk* v. *Kansas*, 274 U. S. 380; *Stromberg* v. *California*, 283 U. S. 359; *Taylor* v. *Mississippi*, 319 U. S. 583; and *Hartzell* v. *United States*, 322 U. S. 680, where the speech used was deemed innocuous.

[27] No case, as far as we know, has applied this rule to an exercise of religion, which, it may be urged, should receive greater protection than speech (Stokes, *supra*, Vol. I, p. 552).

clear and present, so grave and imminent, that the State may lawfully prohibit it, thereby nullifying the canon law that requires it and "prohibiting the free exercise" of religion by that Church.

* * *

We do not defend Communism. No lawyer, trained in the western tradition, could honorably do so. But Communism is not the issue, as the minority opinion shows. *Service to the law is the issue.* We must not be impatient with constitutional restraints. Opposition to Communism is not a mandate to bend the law in the supposed interests of the moment. We must not, ourselves, use those methods we profess to loathe in others.

The attack by the majority upon the Patriarchal Church is not merely unjustified, but, we submit, entirely misplaced. Here is an institution, by tradition and principle, orthodox and conservative, with roots deep in the past. The Church is now officially separated from the State (89). It is the only traditional institution that has survived attack by the Soviet Government; and that government has been compelled to come to terms with what seems to be an indestructible force. The Church "has not been led astray", it has not "sullied its canonical conscience". The pronouncement of Patriarch Sergius is explicit about the "contradiction" between the Orthodox Church and Soviet State and reveals an independence of spirit which was never asserted under the Czars. Does it not serve our highest interests to preserve an institution of this character, rather than go out of our way and gratuitously rain blows upon it?

POINT II

The statute, as construed and applied by the Court of Appeals, is a taking of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

If, by force of the statute, the right to use the Cathedral is taken from the accredited archbishop of the Mother Church and given to another, there would also be a taking of *property* without due process of law. The Cathedral was built by and maintained by the Mother Church with its money for the use of its archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral and its use by it and its archbishop as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

It is hardly necessary to cite authority to show that neither a legislature nor a court may transfer property from one person to another. That has always been deemed contrary to the Constitution:

Ettor v. *Tacoma*, 228 U. S. 148;
Ochoa v. *Hernandez*, 230 U. S. 139.

POINT III

The retroactive application of the statute to this action, which was already pending when the statute was passed, violates the due process clause of the Fourteenth Amendment.

The present ejectment suit was commenced on April 9th, 1945 (67). The statute took effect April 10th, 1945, one day after this action was begun. In other words, this was a "pending" action when Article 5-C became law.

The statute is not retroactive. It does not say it is. It does not purport to be. As construed, it does not affect mere procedure but fundamental rights, already vested before the statute became law. Retroactive application of such a statute violates due process. See: *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338; *Ettor* v. *City of Tacoma*, 228 U. S. 148.

POINT IV

The direction by the Court of Appeals that the Trial Court exercise its "discretion" to determine whether appellant Benjamin is the "proper person" or "proper trustee" to occupy St. Nicholas Cathedral, violates his religious freedom guaranteed by the First and Fourteenth Amendments.

If appellee is entitled to the Cathedral by force of the statute and, if it is constitutional, the above argument becomes academic.

But even if the statute is void, the above disposition of the case on common law lines violates the constitutional guarantee of religious liberty and should be reversed by this Court. A judicial decision no less than an act of legislation which invades protected religious liberty is void

(*Shelley* v. *Kraemer*, 334 U. S. 1; *Backus* v. *Fort Street Union Depot*, 169 U. S. 557; *Brinkerhoff* v. *Hill*, 281 U. S. 673; *Chicago, B. & O. R.R. Co.* v. *Chicago*, 166 U. S. 226).

I.

The Court of Appeals ruled that, apart from the statute, the judgment in favor of appellants should be reversed on common law grounds, with a direction that the trial court "exercise its discretion along the lines herein indicated," i.e., to determine "whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the "proper trustee" to carry out "more * * * faithfully" the Cathedral trust (302 N. Y. at 24).[28]

Having already found that the Patriarchal Church was not "free", and having declined for that reason to follow the canon law and *Watson* v. *Jones*, and having already declared that there was "ample basis" for the selection of Theophilus as the "proper trustee" (302 N. Y. at 21), the direction that the trial court exercise its "discretion", "along the lines herein indicated", is virtually a direction that Benjamin be rejected and that Theophilus be selected. Remission of the case to the trial court was a necessary formality since the Court of Appeals has no authority to exercise discretion in the first instance.

[28] Notwithstanding their earlier assertion that the Cathedral "was dedicated to the use of the members of the diocese", the majority nevertheless seek to "identify" the "proper beneficiaries" of the Cathedral (302 N. Y. at 4) and now its "proper trustees." But Benjamin does not claim to be the trustee. Appellee, holding the legal title, is the trustee for his benefit (*Watson* v. *Jones*, 13 Wall. at 720-2); *Presbyterian Church* case, 222 N. Y. at 321). The majority arbitrarily convert Benjamin from a beneficiary entitled to protection into an involuntary trustee subject to removal.

But the Civil Courts have no such discretion. Canon law determines who is the proper occupant of the Cathedral —here Metropolitan Benjamin—and the Civil Courts have no discretion to contradict the canon law and select another in his place.

Nor is there any need to wait until the actual exercise of such discretion before it can be challenged. The ruling that such discretion exists in the Civil Courts and the direction that it be exercised, are themselves challengable violations of the constitutional guarantee.

ii.

The majority lean heavily on *Kedrovsky* v. *Archbishop and Consistory of the Russian Catholic Church*, 249 N. Y. 75, to authorize the use of "discretion" to bar the appointed archbishop from the cathedral, but that case is irrelevant.

The findings there show that when Archbishop Evdokim left the United States in 1917, he transferred title to over 100 Russian *parish* churches to Alexander whom he later, irregularly, appointed as acting archbishop. Alexander used the assets of these parish churches to promote his private business enterprises. After a receiver was appointed, he also transferred the titles to a board of 5 men. Alexander's malfeasance was established and the lower court directed the titles to be conveyed, via the receiver, not to Kedrovsky, as the majority assert or imply (302 N. Y. at 13), but to a corporation, Archbishop and Consistory, on the theory that it was the "owner" thereof. The Court of Appeals reversed (249 N. Y. 75) on the ground that the Consistory corporation was not the "owner" of the legal titles and, since the titles were nominally in Alexander, who had been adjudged derelict, or in his grantees who took *pendente lite*, the Court remitted the case to the Trial Court to place the titles in the hands of others who would "more faithfully", that

is, more honestly than Alexander, hold the titles for the use of the respective parishes.[29]

St. Nicholas Cathedral was not one of the properties involved in the suit, nor was there any issue as to the undoubted right of the appointed archbishop to occupy it under canon law, and none of the *ecclesiastical* rights or prerogatives of Alexander, as archbishop, assuming he was one, were in any way affected or limited by the *Consistory* decision.

A Civil Court may have supervisory power over "trustees", but it cannot bar or interfere with the exercise by an archbishop of his ecclesiastic functions.

iii.

(a) The use of the *Kedrovsky* record as a basis of the decision against appellants violates due process.

Both majority opinions purport to base their decision against appellants on the "evidence in the records before us" (302 N. Y. at 21, 34). The reference is to the record here and to the *Kedrovsky* record which, it is asserted, was "submitted to us upon the argument" (302 N. Y. at 4). But the *Kedrovsky* record was not "submitted" to, nor was it properly "before" the Court below. Plaintiff's Exhibits 6A, 18 and 18A (dealing with Kedrovsky's appointment and the Sobor of 1923), were not printed here (189, 221, 54, 155) and it was stipulated that "with respect to Plaintiff's Exhibit 6A, 18 and 18A, the Court may be referred to copies of said exhibits appearing in the printed case on appeal" in the *Kedrovsky* case (251). Accordingly, on the argument below, appellee's counsel delivered to the Court for its convenience several copies of that record to enable the judges to have readily at hand the above 3 ex-

[29] Neither individually nor as archbishop did Kedrovsky claim these titles. He had no right to them. There is no requirement of canon law that the archbishop hold the *titles* to *parish* churches in his name. That is not one of his *ecclesiastical* functions.

hibits. Of course, the *Kedrovsky record* was not thereby "submitted" to, or placed "before" the Court, certainly not by appellants. Indeed, portions of that record which they had offered in evidence was, on appellee's objection, *excluded* by the trial court (97-98). The *Kedrovsky* record was *not* "submitted" to or "before" the Trial Court and it is not before this Court.

Nor is that all. The majority base their decision (302 N. Y. at 7-9) on the claims and that version of events (not contained in our record) which were offered by the *defeated* defendants in the *Kedrovsky* trial and *rejected* by the Appellate Division in that case which made *contrary* findings favorable to *Kedrovsky* (214 App. Div. at 489).[30]

In these circumstances, to base a decision adverse to appellants on the *Kedrovsky* record, which was used as part of the history of the Russian Church deemed "vital to our inquiry" (302 N. Y. at 4), is to deny them due process of law.

POINT V

The failure and refusal of the Court of Appeals to rule on the merits of the defense of limitations of appellant Benjamin, while directing final judgment against him, is a denial of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

Even if the statute be upheld, the above contentions remain valid.

Appellant Benjamin pleaded the statute of limitations as an affirmative defense (4, 161) which, under state law,

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[30] Thus, by way of example, Judge Conway gives the text of a document of September 1923 (taken from the *Kedrovsky* record but not contained in our record) as proof that Platon was *appointed* Archbishop by the Patriarch (302 N. Y. at 9). But that document, which was alleged to be a forgery, had been *rejected* by the Appellate Division in that case (214 App. Div. at 485-6, aff'd 242 N. Y. 547).

(New York Civil Practice Act, Sec. 34), is 15 years. Title to the Cathedral was transferred to appellee on April 17th, 1925 (204). Its possession terminated April 2nd, 1926 (23-24). This action was commenced April 9th, 1945 (67). During these intervening 19 years it was continuously out of possession and made no attempt to recover the Cathedral (24, 160) which was held adversely by the Kedrovskys. Hence, the defense is valid on its face and this action is barred.

At the trial (67-8, 70, 78-80) and on their appeal in the courts below (where the parties devoted many pages of their brief to this issue), appellee's *sole* (68) contention was that the statute had been tolled, i.e. the "commencement" of this action in ejectment had been "stayed" (New York Civil Practice Act, Sec. 24) by two injunctions: (a) the permanent injunction in favor of Kedrovsky, as Archbishop, and against the two individual defendants in the *Kedrovsky* case, issued in 1926 and (b) an alleged *temporary* injunction, which it was claimed was granted, in July 1926, in an action, based on said permanent injunction, by Kedrovsky, as Archbishop, against appellee (70, 67). An unsigned, undated copy of this temporary injunction (189-190) was *excluded* by the trial court (80) and, by means of an affidavit of appellee's counsel, submitted after the trial, and which was also excluded (250-251), it attempted to show that such an injunction had been issued and to reconstruct its terms (189-190, 193-203, 248-249).

Appellant Benjamin contended at the trial and on both appeals, and on the motion for reargument, that these injunctions did not toll the statute.

Thus, appellee was not a party to the *Kedrovsky* case and the injunction there did not run against it (175-176). In any event, it enjoined only *physical* interference with Kedrovsky's possession (176) and did not, as appellee admitted, bar commencement of summary proceedings against Kedrovsky himself to recover possession of the Cathedral (249). Similarly it did not "stay" the "com-

mencement" of the ejectment action, i.e., service of a summons and complaint.

The alleged, excluded *temporary* injunction was, if issued, conditioned on an early trial (190) and terminated when the main action lapsed (67). Appellee's theory that the action "started and lapsed, but the injunction did not" (67) is hardly tenable. It also enjoined only physical interference (190), and, if it existed in the form asserted, it did not bar an ejectment action. Both injunctions ran against Kedrovsky, as archbishop (70, 176, 189).

The trial court, the Appellate Division, and the minority in the Court of Appeals did not pass on the defense of limitations, but, since they ruled in Benjamin's favor, it was unnecessary to do so. But when the Court of Appeals rendered final judgment *against* this appellant, it was bound to pass on his defense on the merits and its failure to do so in the original decision, and its refusal to do so on the motion for reargument, which specifically requested a ruling on this issue, is a denial of due process.

The Court of Appeals thus summarily dismissed appellant Benjamin's defense of limitations (302 N. Y. at 21):

> "Only the first (defense) need concern us here. The second, third and fourth defenses, i.e.: nonuser and lack of authority in plaintiff, the statute of limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor. There was little or no discussion concerning them and they have been effectively eliminated from the case."

The above statement flatly contradicts the indisputable facts as to the defense of limitations. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at the trial, it was pressed on the appeals to both courts below and the quoted statement is plainly mistaken.

Failure or refusal to pass on a properly raised defense, denies a defendant the right to defend and deprives him of a fair hearing, and thus denies him due process of law (*Morgan* v. *United States*, 298 U. S. 468, 480-1). In analagous cases it was deemed a denial of due process to deprive a party in a civil action of representation by counsel of his choice (*Roberts* v. *Anderson*, 66 Fed. (2d) 874, 6; cf. *Cooke* v. *U. S.*, 267 U. S. 517, 537 and *Powell* v. *Alabama*, 287 U. S. 45), or even, under certain circumstances, to bar oral argument at a hearing (*Federal Communications Commission* v. *W J R*, 337 U. S. 265, 273-277).

Conclusion

We respectfully submit that the judgment of the Court of Appeals employs a theory of decision dangerous to the administration of justice and nullifies basic constitutional liberties. It should be reversed with a direction that the judgment in favor of appellants be affirmed.

Respectfully submitted,

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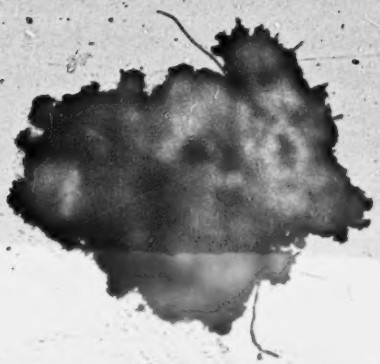

EXHIBIT A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.

106. Incorporation of Russian Orthodox churches.

107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.

108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers to* [is] that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and [Alaska] *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred *Governing* Synod in Moscow until in or about nineteen

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Explanation—The amendment of 1948 added the words in italics and omitted the words in brackets.

hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district *created* pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox [Church] church", *as that term is used anywhere in this article,* is a church, cathedral, chaptel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined as* the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox [Church] *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian [Orthodox] Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian [Orthodox] Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usages of the Russian [Orthodox] Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian [Orthodox] Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November

twentieth to twenty-third, nineteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

APPENDIX B

In House Document #754, published by the United States Government in 1946, entitled "Communism in Action", which is described as "A Documentary Study and Analysis of Communism in Operation in the Soviet Union", prepared by the Legislative Reference Service of the Library of Congress, there is an instructive chapter on religion in the Soviet Union (pp. 127-132) which in no wise sustains the position of the majority. On the contrary, the impression created is a totally different one.

The pamphlet points out that "for an understanding of the position of religion in the Soviet Union of today, it is necessary to understand the background of religion under Tzardom" (p. 126), that, since the church was part of the state, "it was inevitable that the church should be the center of Bolshevik attack" (p. 126). Nevertheless, even in the darkest hours after the Revolution, "religious worship was never forbidden" (p. 127); and since 1938, "a drastic change has taken place in the attitude of the Soviet Government toward the church" (p. 128), and the Government acknowledged the failure of its anti-religious measures (p. 128).

The pamphlet continues:

> (p. 129) "The position of the church soon became defined as a 'useful and loyal element in society.' Soviet citizens were permitted to attend religious services freely, additional churches were opened, anti-religious propaganda ceased, godless publications were discontinued, and antireligious museums were closed. The Soviet's changed attitude toward religion was illustrated in 1942 during the strict wartime curfew in Moscow and other cities. On the night of the Eve of Easter Day, in spite of the grave risks involved, the curfew was lifted so that all who wished could attend the midnight services in the churches".

In addition, in 1945, approximately one-half of the property confiscated in 1923, including ancient shrines, were restored (p. 130), theological seminaries were reopened, and religious education and the publication of religious books were resumed (p. 130-1).

This study then proceeds as follows:

> (p. 131) "An important event in church affairs was the Orthodox Congress held in Moscow in January 1945, at which time Alexei was elected Patriarch to succeed Sergius whose death had occurred in May 1944. Several significant features of this Sobor are noted. The state was obviously ready to meet religious revival halfway. It was evident that the war years had allayed to a great extent the Soviet suspicion that the Church was mainly engaged in conspiring against the Government. Both the church and the Government realized that cooperation would benefit all concerned. Traditional formalities were observed with great care in convening the Congress. Participating in the ceremonies of consecration were Patriarchs, Metropolitans, and bishops from the Balkans, the Near East, and the Far East."

"Religion in Russia", (1946) Harper & Bros., by Prof. Casey, of Brown University, is to the same effect (pp. 178, 182-190). See also Bolshakoff, *The Christian Church and the Soviet State* (1942) MacMillan & Co., who states that Sunday is now a compulsory weekly holiday and absenteeism on religious holidays is allowed (p. 55).

N. S. Timasheff, who is Professor of Sociology at Fordham University in New York, in his recent book *"The Great Retreat"*, published in 1946 by Dutton & Co., points out that the Soviet antireligious propaganda failed, as the Soviet authorities themselves acknowledged (p. 227), and that the Soviet Government retreated from its initial anti-church and anti-religious position and accommodated itself to the existence of the church as a religious and social body. He concludes:

> (p. 237) "It is obvious that in 1944, the status of religion in the Communist State was entirely different from that of the year 1937-1938. The church is now an officially recognized social force."

Paul Anderson, in his book, *"People, Church and State in Modern Russia"*, from which plaintiff quotes the statement of Patriarch Sergius (plaintiff's Ex. 15-A, 207-8) and Stalin's statement (plaintiff's Ex. 15-B, 208-9), in no wise supports the claim of the majority (see the remarkable statement of the Russian Bishops at pp. 89-94). On the contrary, Mr. Anderson, writing in 1944, concludes:

> (p. 214) "The second reason for rejecting the idea of a state church is that the Orthodox Church itself, under its present leadership, sees too clearly the distinction between its God-given and God-directed purpose and the materialistic, albeit, humanitarian, character of the Soviet state, to willingly accept any formal State-Church or established church position. It desires to be, and feels itself to be, the Church of the Russian people, not the Church of the Soviet State."

Bolshakoff, *supra*, concludes:

> (p. 75) "The Church of Christ is eternal. It survived the Roman Empire, the dark ages, the disorders and tribulations of every kind, invasions, revolutions, wars. It Christianized the most unlikely societies and institutions. It may Christianize the Soviet State as well."

The majority stress the persecutions of the Patriarchal Church by the Soviets prior to 1927 (302 N. Y. at 6-8), but the survival of that Church attests to its vitality and indestructability. The trials of the Russian Church and its consequent evolution were by no means unique in Church history. They parallel the experience of the French Church (Phillips *"The Church in France, a Study in Revival,"*

pp. 7-19, 23-41; Walker, "*History of the Christian Church,*" p. 558). That church was also identified with the state and both suffered a common fate. "The tremendous storm of the French Revolution was about to break and to sweep away the church, with the nobility, the throne, and kindred ancient institutions" (Walker, *supra,* p. 558). The lands of the Church were confiscated, the religious orders were suppressed, the tithes were repealed, many of the clergy were executed, the survivors were converted into civil servants and the authority of the Pope over the Church was abolished (Phillips, *supra,* pp. 23-41). The aim of the revolutionary leaders was "the extinction of the Christian religion in general and of Catholicism in particular" (Phillips, *supra,* p. 12): "In 1793 the Jacobin leaders procured the abolition of Christianity" (Walker, *supra,* p. 558) and substituted in its stead the Goddess of Reason. And even when religious freedom was proclaimed, the state "was in reality strongly anti-christian" (Walker, *supra,* p. 558; Phillips, *supra,* pp. 23-41).

However, ancient forces reasserted themselves and within a generation the French Church resumed its vital position among the French people. What Phillips, *supra,* says of the French Church is equally applicable, we believe, to the Russian Church:

> (p. VII). "Just as in the case of the Roman Catholic propaganda in England under Elizabeth, it is hard to say how far the opposition (of the clergy) was inspired by religious, how far by political motives. Undoubtedly, both kinds of motives were present but the result in any case was persecution—the persecution of the Catholic religion as such. And persecution had its usual effect, *sanguis martyrum semen ecclesiae.* The Church of France, which had entered the revolutionary period, powerful but spiritually languid and in many ways corrupt, emerged from it poor indeed, but filled with moral and religious fervor long unknown."